Supreme Court, U. S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-449

JOSEPH TURCIO, *Petitioner*

v.

STATE OF CONNECTICUT, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

RESPONDENT
State of Connecticut

ERNEST J. DIETTE, JR.
Assistant State's Attorney
Office of the
Chief State's Attorney

STATEMENT OF ISSUES

Page

I. Whether the determination of the Supreme Court of the State of Connecticut, that the trial court's jury charge on the particular care to be given to the testimony of certain witnesses bearing a special relationship to the defendant was not favored but did not constitute harmful error, provides this Court with a federal question of substance? 2

II. Whether the defendant's attempt to have this Court adopt a per se rule with regard to the need for the presence of a parent, attorney or guardian before a juvenile may waive his *Miranda* rights should fail in light of this Court's recent decision of *Fare v. Michael C.*, _____ U.S. _____, 99 S.Ct. 2560 (1979) which, on a similar set of facts, rejected the per se approach to this issue, in favor of a "totality of the circumstances" test? 5

CONCLUSION 7

STATEMENT OF THE CASE

The Respondent does not contest the statement of the case as set forth in the Brief of the Petitioner, pp. 3-10.

ARGUMENT

I. THE DETERMINATION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT, THAT THE TRIAL COURT'S JURY CHARGE ON THE PARTICULAR CARE TO BE GIVEN TO THE TESTIMONY OF CERTAIN WITNESSES BEARING A SPECIAL RELATIONSHIP TO THE DEFENDANT WAS NOT FAVORED BUT DID NOT CONSTITUTE HARMFUL ERROR, DOES NOT PROVIDE THIS COURT WITH A FEDERAL QUESTION OF SUBSTANCE.

Without in any way attempting to urge this Court to approve the "particular care" charge which the Supreme Court of the State of Connecticut has already found to be "inappropriate" and something to be "discouraged" (see Opinion, p. 7a of The Appendix to Petitioner's Brief), the Respondent would respectfully submit that the Petitioner has simply failed to state a claim, herein, which even remotely resembles one of constitutional dimension or substance.

Petitioner's misapprehension of the purpose of the Writ of Certiorari can be readily observed from his failure to cite a single federal District Court or Court of Appeals decision in this first portion of his Brief. That Argument, likewise, is devoid of a single reference to precisely which constitutional rights he has been denied by the trial court's charge here, as well as the state Supreme Court's decision thereon.

The weakness of Petitioner's first argument can be readily gleaned from his claim that the appellate courts of **three states**, to wit: Washington, Minnesota and North Carolina (see p. 12 of Petitioner's Brief) have condemned a similar charge. Indeed, it may properly be

said now, in light of the decision in *State v. Turcio,* Conn. (40 Conn. L.J. No. 52, p. 4. June 26, 1979), that the *State of Connecticut* also disapproves and discourages the giving of such a charge. None of this means, of course, that the Petitioner has cited a claim of constitutional substance, cognizable by this Court as a matter requiring uniform, federal determination.

Rather, the Supreme Court of Connecticut acted as a state court in determining that the charge in Petitioner's case, when read as a whole, had deprived him of no state or federally protected right.

The charge used in the present case was no more significant, constitutionally, than that allowed by Oregon's statutory "Every witness is presumed to speak the truth"--charge in *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973).

In *Cupp v. Naughten*, supra, 94 S.Ct. at p. 400, this Court ruled:

> "...Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is **undesirable, erroneous, or even "universally condemned,"** but that it violated some right which was guaranteed to the Defendant by the Fourteenth Amendment.
>
> In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd v. United States*, 271 U.S. 104, 107, 46 S.Ct. 442, 443, 70 L.Ed. 2857 (1926). While this does not mean that an instruction by itself may **never** rise to the level of constitutional error,

see *Cool v. United States*, 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." (emphasis added)

The Supreme Court of Connecticut, in *State v. Turcio*, supra, has weighed the entire charge to the jury with the one, brief reference to the "particular care" to be given to certain of the defendant's witnesses, and ruled that same are "inappropriate and should be discouraged" but the Petitioner was not harmed by the charge, in light of the fact that the jury had already been instructed elsewhere in the charge that in weighing the credibility of **all witnesses** they could consider the ordinary factors that might affect recollection or produce bias. (See p. 7a of the Appendix to Petitioner's Brief).

In his Brief before this Supreme Court, the Petitioner has not suggested a single, substantial constitutional right he has denied by the lone paragraph culled from the court's lengthy charge here, nor has he cited a single federal District Court or Circuit Court of Appeals decision addressing this issue in constitutional terms.

With this state of the record, there is no reason to believe that this Court will exercise its discretion and accept this Argument as one needing a uniform, federal and constitutional resolution.

II. THE DEFENDANT'S ATTEMPT TO HAVE THIS COURT ADOPT A PER SE RULE WITH REGARD TO THE NEED FOR THE PRESENCE OF A PARENT, ATTORNEY OR GUARDIAN BEFORE A JUVENILE MAY WAIVE HIS *MIRANDA* RIGHTS MUST SURELY FAIL IN LIGHT OF THIS COURT'S RECENT DECISION OF *FARE V. MICHAEL C.*, _____ U.S. _____, 99 S.CT. 2560 (1979) WHICH, ON A SIMILAR SET OF FACTS, REJECTED THE PER SE APPROACH TO THIS ISSUE, IN FAVOR OF A "TOTALITY OF THE CIRCUMSTANCES" TEST.

In light of this Supreme Court's recent decision in *Fare v. Michael C.*, _____ U.S. _____, 99 S.Ct. 2560 (decided June 20, 1979 – i.e., within one week of the decision by the Supreme Court of the State of Connecticut in *State v. Turcio*, supra, decided June 26, 1979) there is no reason to believe that the issue Petitioner seeks to raise would be one which the Court would deem worthy of certiorari consideration.

In *Fare*, supra, the issue presented was virtually identical to that presented in *State v. Turcio*, supra. The defendents were aged sixteen (in *Turcio*) and sixteen and one-half (in *Fare*). In *Fare*, the Petitioner sought to create a per se rule with regard to a juvenile's request to speak to a probation officer. In *Turcio*, the Petitioner seeks a per se rule with regard to a juvenile's request to be allowed to speak with his parents prior to waiving his so-called *Miranda* rights. The Supreme Court of Connecticut determined this issue adversely to the Petitioner after employing a "totality of the circumstances" test.

In *Fare*, supra, 99 S.Ct. at p. 2573, this Court ruled as follows:

"...We hold, in short, that the California Supreme Court erred in finding that a juvenile's request for his probation officer was a per se invocation of that juvenile's Fifth Amendment rights under *Miranda*. We conclude, rather, that whether the statements obtained during subsequent interrogation of a juvenile who has asked to see his probation officer, but who has not asked to consult an attorney or expressly asserted his right to remain silent, are admissible on the basis of waiver remains a question to be resolved on the **totality of the circumstances** surrounding the interrogation. On the basis of the record in this case, we hold that the juvenile court's finding that respondent voluntarily and knowingly waived his rights and consented to continued interrogation, and that the statements obtained from him were voluntary, were proper, and that the admission of those statements in the proceeding against respondent in juvenile court was correct." (Emphasis added)

In the present case, as Petitioner's Brief, p. 22 concedes, the trial court found that the record did not indicate whether the defendant had asked to talk to his parents or not. Furthermore, the entire issue of a per se right to have the minor's parents present before an effective, voluntary waiver of his *Miranda* rights could be found was never raised before the trial court. Since (as Petitioner's Brief, p. 21, again, concedes) the record also demonstrates that the sixteen-year-old Petitioner was advised of his *Miranda* rights at least **three times** on the night of his arrest; was allowed consultation with his attorney (Mr. Dahlmeyer) as soon as the latter arrived at the police station during the questioning; and made certain incriminating statements shortly after being transported to the police station, rather than after any prolonged interrogation, there is no reason to believe that the trial court erred in finding that Petitioner's statements were voluntarily given or that the

Supreme Court of the State of Connecticut erred in upholding that lower court determination, after applying a "totality of the circumstances," rather than a "per se," test to the facts of Petitioner's case.

CONCLUSION

The decision of the Supreme Court of the State of Connecticut does not contravene any substantive rights of the Petitioner. His claims do not rise to the level of constitutional dimension and, thus, it is respectfully requested that the Petition be denied. *Duncan v. Tennessee*, 405 U.S. 127, 92 S.Ct. 785. 31 L.Ed.2d 86 (1972).

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